Supreme Court, U. S.
FILED
SEP 20 1980
MICHAEL RODAK, JR., CLERK

NO. 80-455

In the Supreme Court of the United States

OCTOBER TERM, *1980*

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Intervenor

VERSUS

LYKES BROTHERS STEAMSHIP COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

A) QUESTIONS PRESENTED

1) Does the application of the negligence standard found in Sections 342, 343, and 343(A) of the Restatement (Second) of Torts (1965) to the adjudication of a motion for summary judgment of dismissal in a wrongful death action brought pursuant to 33 U.S.C. § 905(b), contravene the Congressional intent expressed in the passage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act in that these Restatement (Second) of Torts sections import the doctrines of contributory negligence and assumption of the risk?

2) Even if the Restatement of Torts standard is applied, should not a shipowner be liable for the wrongful death of a harbor worker killed aboard the vessel as a result of a fall from a hazardous scaffold where the shipowner, through its employees, had actual and constructive knowledge of the dangers posed by the scaffold yet failed to warn the harbor worker or to take steps to alleviate the hazard?

TABLE OF CONTENTS

QUESTIONS PRESENTED. i
TABLE OF CITATIONS. ii
OPINIONS RENDERED. 1
STATEMENT OF JURISDICTION. 1
STATUTES INVOLVED. 2
STATEMENT OF THE CASE. 3
ARGUMENT IN SUPPORT OF PETITION 6
APPENDIX. 18
PROOF OF SERVICE. 26

TABLE OF CITATIONS

CASES

1. *Anuszewski v. Dynamic Mariners Corp., Panama,* 540 F. 2d 757 (4th Cir. 1976) cert. den.429 U.S. 1098 7
2. *Brown v. Mitsubishi Shintaku, Ginko,* 550 F. 2d 331 (5th Cir. 1977). 6,9,20
3. *Chavis v. Finnlines Ltd.,O/Y,* 576 F. 2d 1072 (4th Cir 1978). 7
4. *Clemons v. Mitsui O.S.K. Lines Ltd.,* 596 F. 2d 746 (7th Cir. 1979) 7
5. *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 99 S. Ct. 2753 (1979) 11,14,15,16
6. *Gallardo v. Westfal-Larsen & Co. A/S,* 435 F. Supp 484 (N.D.Cal. 1977). 11
7. *Gay v. Ocean Transport & Trading Ltd.,* 546 F. 2d 1233 (5th Cir. 1977). 6,9,20

8. *Griffith v. Wheeling-Pittsburgh Steel Corporation*, 610 F. 2d 116 (3rd Cir. 1979), U.S. Appeal pending, *No. 79-813* 12,15,16,17

9. *Johnson v. A/S Ivarans Rederi*, 613 F. 2d 334 (1st Cir. 1980), U.S. Appeal pending, No. 79-1587 11,12,17

10. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959). 12

11. *Lubrano v. Royal Netherlands S.S. Co.*, 572 F. 2d 364 (2nd Cir. 1978) 7

12. *McCullough v. S/S Coppename*, 609 F. 2d 208 (5th Cir.1979) (Withdrawn from publication at the request of the court), No. 77-1066 12,17

13. *Napoli v. Hellenic Lines, Ltd.*, 536 F. 2d 505 (2nd Cir. 1976). 7

14. *Rich v. United States*, 596 F. 2d 541 (3rd Cir. 1979) 12

15. *Samuels v. Empresas Lineas Maritimas Argentinas*, 573 F. 2d 884 (5th Cir. 1978) cert. den. 443 U.S. 915, 99 S. Ct. 3106 (1979) 6

16. *Santos v. Scindia Steam Navigation Company*, 598 F. 2d 480 (9th Cir. 1979) U.S. Appeal pending No. 79-512 12,17

17. *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F. 2d 789 (2nd Cir. 1979) 7

18. *Wiles v. Delta Steamship Lines, Inc.*,
574 F. 2d 1338 (5th Cir. 1978). 6

STATUTES

28 U.S.C. § 1254 2
28 U.S.C. § 1331 5
33 U.S.C. § 905(b). 2,5,7,10,13,14

MISCELLANEOUS

House Report No. 92-1441, 92nd Cong., 1st Sess., reprinted in 1972 U.S. Code Cong. and Admin. News 4698

Restatement (Second) of Torts

Section 342 7

Section 343 8

Section 343(A) 8

COMMENT, "The Injured Longshoreman vs. The Shipowner After 1972" Business Invitees, Land-Based Standards, And Assumption of Risk, 28 Hastings L.J. 771 (1977). 12

OPINIONS RENDERED

No written opinion has been rendered in this matter in the United States District Court for the Eastern District of Louisiana or in the United States Court of Appeals for the Fifth Circuit. Accordingly, there are no official or unofficial reports of opinions delivered in the courts below.

B) GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The judgment sought to be reviewed was rendered by the United States Court of Appeals for the Fifth Circuit on May 27, 1980, affirming the judgment of the United States District Court for the Eastern District of Louisiana which was rendered on September 12, 1979.

(ii) Application for a panel rehearing was filed with the

United States Court of Appeals for the Fifth Circuit on June 9, 1980. The application for rehearing was denied on June 23, 1980.

(iii) The intant litigation arises under 33 U.S.C. § 905(b), Longshoreman's and Harbor Workers' Compensation Act. Accordingly, the instant action presents a federal question and this Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

This case involves the interpretation of 33 U.S.C. § 905 (b), added to the Longshoremen's and Harbor Workers' Compensation Act by the 1972 Amendments:

> "In the event of injury to a person covered under this chapter caused by the negligance of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services no such action shall be permitted if the injury was caused by negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of

> seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

On October 7, 1977, John Futo was working as a machinist for Dixie Machine Welding and Metal Works aboard the S.S. Shirley Lykes, which was docked in navigable waters in the Mississippi River near the Andry Street Wharf in the City of New Orleans,Louisiana. The S.S. Shirley Lykes was undergoing minor, general repairs in connection with a survey required by the American Bureau of Shipping of all American flag vessels every five years. (Record on appeal, Vol. I at 232-233.) During the repair work the vessel remained equipped with its engines and propellers, maintained a crew, and was in navigation. (Record on appeal, Vol, I at 239-242.) At all times during the survey repair work, the vessel and repair work were under the control of Lykes Brothers Steamship Company, Inc. through its captain, crew and the Lykes Brothers port engineer and port captain assigned to the vessel. (Record on appeal, Vol. I at 206-7, 209, 236-7, 242.) The job specifications which Dixie Machine Welding and Metal Works was contractually obligated to perform aboard the S.S. Shirley Lykes contain repeated references to anticipated supervisory involvement by representatives of Lykes Brothers Steamship Company, Inc. (See Record on appeal, Vol. I at 45-78 .) The captain, a sea-

man of 27 years and crew members (one of whom had 32 years of experience, 19 of these aboard the S.S. Shirley Lykes) of the S.S. Shirley Lykes made regular inspections of the vessel and work areas throughout the survey repair work, and more specifically during the period in which the hazard, which caused John Futo's death, was present in one of the work areas aboard the vessel. (Record on Appeal, Vol.I at 206, 207, 209, 236, 237, 242.)

While the S.S. Shirley Lykes was under the control of Lykes Brothers on October 7, 1977, John Futo fell to his death from a defective scaffold while dismantling one of the vessel's derricks. (Record on Appeal, Vol. I at 203-4). The scaffold from which he was caused to fall lacked proper guardrails, which condition Lykes Brothers crew members recognized as hazardous.(Record on Appeal, Vol. I at 203, 204, 253; Vol. II at 3). Even though Lykes Brothers crew members recognized the hazardous condition posed by the lack of guardrails on the scaffold, the District Court found that they failed to warn the decedent of the danger and failed to take any affirmative steps to alleviate the hazardous condition. (Record on Appeal, Vol. II at 3).

On October 28, 1977, John Futo's widow, the plaintiff, Maria Toth Futo, on behalf of herself, her one year old child and her unborn infant, brought suit in the United States District Court for the Eastern District of Louisiana against Lykes Brothers Steamship Company, Inc., the owner of the S.S. Shirley Lykes, for its negligent failure to warn of and correct the

hazardous condition aboard the vessel which led to John Futo's death. (Record on Appeal, Vol. I at 1). The basis for federal jurisdiction in the District Court was established by the fact that the action was brought pursuant to a federal statute, 33 U.S.C. § 905(b), and the District Court's "federal question" jurisdiction was therefore invoked within the meaning of 28 U.S.C. § 1331. The action sought recovery for the decedent's pain and suffering before his death, for decedent's wrongful death and for plaintiff and her minor childrens' loss of support, maintenance, education, guidance, society, nurture and for funeral expenses incurred.

On August 16, 1979, the defendant, Lykes Brothers Steamship Company, Inc. filed a motion for summary judgment. (Record on Appeal, Vol, I at 173). On September 12, 1979, the motion for summary judgment came on for hearing and was granted by the District Court, dismissing plaintiff's case at her cost and depriving her and her children of their right to have their case tried to a jury on its merits. (Record on Appeal, Vol. I at 332). Plaintiff filed notice of appeal to the United States Court of Appeals for the Fifth Circuit on September 21, 1979. (Record on Appeal, Vol. I at 329). On May 27, 1980, the Fifth Circuit Court of Appeals, panel of Judges Gee, Henderson and Hatchett presiding, summarily and without oral argument affirmed the judgment of District Court without written opinion. On June 9, 1980, plaintiff filed with the Fifth Circuit Court of Appeals a petition for panel rehearing and on June 23, 1980, the Court of Appeals denied the petition for rehearing.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMED A GRANT OF SUMMARY JUDGMENT BASED UPON A NEGLIGENCE STANDARD WHICH, WHEN APPLIED TO NEGLIGENCE ACTIONS BROUGHT PURSUANT TO 33 U.S.C. § 905(b), CONTRAVENES THE EXPRESS INTENTION OF CONGRESS THAT THE DOCTRINES OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK WOULD NOT BE IMPORTED INTO THE ADJUDICATION OF SHIPOWNER LIABILITY UNDER THAT STATUTE. *THERE EXISTS AN IRRECONCILABLE SPLIT OF OPINION AMONG THE CIRCUITS REGARDING THE APPROPRIATE NEGLIGENCE STANDARD TO BE APPLIED TO ACTIONS BROUGHT PURSUANT TO 33 U.S.C. § 905(b). ACCORDINGLY, IT IS SUBMITTED THAT THIS HONORABLE COURT SHOULD GRANT THE INSTANT PETITION FOR WRIT OF CERTIORARI FOR THE PURPOSE OF DEFINING THE APPROPRIATE 905(b) NEGLIGENCE STANDARD.*

Since its seminal decision in *Gay v. Ocean Transport & Trading, Ltd.*, 546 F. 2d. 1233 (5th Cir. 1977), the Fifth Circuit Court of Appeals has applied Sections 342, 343 and 343 (A) as the shipowner's negligence standard in actions brought pursuant to 33 U.S.C § 905(b) *Gay, supra* at 1238; *Brown v. Mitsubishi Shintaku Ginko*, 550 F. 2d 331, 333 (5th Cir. 1977); *Wiles v. Delta Steamship Lines, Inc.*, 574 F. 2d 1338 (5th Cir. 1978); *Samuels v. Empresas Lineas Maritimas Argen-*

tinas, 573 F. 2d 884, 886 (5th Cir. 1978), cert. den. 443 U.S. 915, 99 S. Ct. 3106, 61 L. Ed. 2d 878 (1979). Similarly, the Second Circuit has adopted these Restatement sections as its § 905(b) negligence standard, *Napoli v. Hellenic Lines*, 536 F. 2d 505 (2nd Cir. 1976); *Lubrano v. Royal Netherlands S.S. Co.*, 572 F. 2d 364 (2nd Cir. 1978); *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F. 2d 789, 795 (2nd Cir. 1979) as well as the Fourth Circuit, *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F. 2d 757 (4th Cir. 1976), cert. den. 429 U.S. 1098, *Chavis v. Finnlines Ltd. O/Y*, 576 F. 2d 1072 (4th Cir. 1978). Moreover, the Seventh Circuit has indicated a willingness to adopt the abovementioned Restatement sections. *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F. 2d 746 (7th Cir. 1979).

Sections 342, 343 and 343(A) of the Restatement (Second) of Torts (1965) read as follws:

Section 342 states:

> "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved."

Section 343 states:

"A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against danger."

Section 343 (A) continues, *

"(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of

* Restatement (Second) of Torts § 343, Comment a (1965) instructs that section 343 should be read together with § 343(A).

> the facilities of a public utility, is a factor of a public utility, is a factor of importance indicating that the harm should be anticipated."

In granting the defendant Lykes Brothers' Motion for Summary Judgment, the District Court indicated in its oral assignment of reasons for judgment that it had relied upon the § 905(b) negligence standard as first enunciated in *Gay v. Ocean Transport & Trading, Ltd., supra* and as paraphrased in *Brown v. Mitsubishi Shintaku Ginko, supra.* (Record on Appeal, Vol. II at 3,4,5,6). The District Court defined the appropriate negligence standard accordingly:

> "A three part analysis is necessary to determine the shipowner's liability.
>
> First, did the crew know of the hazard, and if so did the crew warn the invitees?" (Record on Appeal, Vol. II at 3)
>
> * * *
>
> "Second, according to *Brown*, even if the crew was aware of the danger, it could be relieved of its duty to warn if the deceased knew or should have known of the danger." (Record on Appeal, Vol. II at 3).
>
> * * *
>
> "The third part of the analysis laid out in *Brown* requires an answer to the following question:
>
> 'Even though the Plaintiff was aware of the hazard, should the Defendant have anticipated that the deceased, notwithstanding his knowledge of the danger, would

continue to expose himself to the hazard?'

If the answer is yes, the shipowner would still have a duty to correct the hazard.

If the answer is no, the shipowner would be relieved of this duty, even though the crew knew of the danger." (Record on Appeal, Vol. II at 5)

It is submitted that the negligence standard adopted by the Fifth Circuit and applied by the District Court in the instant case contravenes the express intention of Congress that the doctrines of contributory negligence and assumption of the risk would not be imported into the adjudication of shipowner liability in actions brought pursuant to 33 U.S.C. § 905(b). This contention is supported by the legislative history of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, which states, in pertinent part:

"The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employees's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable." (H. Rep. No. 92-1441, 92nd Cong., 1st Sess., reprinted in 1972 U.S. Code Cong. and Admin. News at 4704-4705.)

Unfortunately, the Second, Fourth and Fifth Circuits, as well as the District Court in the instant case have failed to follow this clear expression of legislative intent and have adopted a § 905(b) negligence standard which clearly embraces the prohibited doctrines of contributory negligence and assumption of risk. (See Restatement of Torts (Second) 1965 § 343, Comment b and § 343(A) Comment c). In so doing "the Restatement sections force courts to define a shipowner's standard of care under the amendments in terms of the plaintiff's perceptions of the danger posed by a given condition" and "(t)he sections thus tend to foreclose a balanced inquiry into the reasonableness of a vessel's conduct under the circumstances of a particular case and tend to limit the liability of shipowners for their proven negligence." *Gallardo v. Westfal-Larsen & Co. A/S,* 435 F. Supp. 484 (N.D. Cal. 1977). Accordingly, it is submitted that such a negligence standard is inconsistent with the view expressed by this Honorable Court in *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 99 S. Ct. 2753 (1979) that "we must reject a 'theory that nowhere appears in the Act, that never was mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts. . . a remedial Act. . ." 443 U.S. at 271.

Three Circuits agree with plaintiff's position and have rejected the abovementioned Restatement sections as carrying the prohibited contributory negligence/assumption of risk baggage. They include the First Circuit in *Johnson v. A/S Ivarans*

Rederi, 613 F. 2d 334 (1st Cir. 1980), U.S. Appeal pending, No. 79-1587, the Third Circuit in *Griffith v. Wheeling-Pittsburgh Steel Corporation*, 610 F. 2d 116 (3rd Cir. 1979), U.S. Appeal, pending No. 79-813, and *Rich v. United States*, 596 F. 2d 541, n. 21 (3rd Cir. 1979) and the Ninth Circuit in *Santos v. Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir. 1979), U.S. Appeal pending, No. 79-512. See also the dissent of Judge Godbold in *McCullough v. S/S Coppename*, 609 F. 2d 208 (5th Cir. 1979); Comment, 28 Hastings L.J. 771 (1977). These Circuits have all adopted instead a "reasonable care under the circumstances" standard inspired by this Court's decision in *Kermarec v. Compagnie Generale Transaltantique*, 358 U.S. 625, 79 S. Ct. 406 (1959), which is representatively stated in *Johnson v. A/S Ivarans Rederi, supra*, as follows:

> "The standard of reasonable care under the circumstances permits a finding of negligence upon a showing:
>
> (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury;
>
> (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and
>
> (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger," 613 F. 2d at 348; Accord: *Griffith v. Wheeling-Pittsburgh Steel*

Corporation, supra, 610 F. 2d at 125-126; *Santos v. Scindia Steam Navigation Co.,* 598 F. 2d at 485-486.

It is submitted that, in the instant case, in view of the fact that the District Court found that ". . . the crew did know of the danger, but failed to warn the deceased", (Record on Appeal, Vol. II at 3), had the District Court applied the proper negligence standard it would have denied the "Motion for Summary Judgment". Accordingly, because the application of the Restatement sections led to an erroneous judgment and affirmance in the instant case and because there is a split of authority among the Circuits regarding the proper negligence standard to be applied to § 905(b) actions, it is respectfully submitted that the instant "Petition for Writ of Certiorari" should be granted.

II. EVEN IF THE RESTATEMENT SECTIONS STATE THE PROPER NEGLIGENCE STANDARD TO BE APPLIED IN ACTIONS BROUGHT PURSUANT TO 33 U.S.C. § 905(b), IN THE INSTANT CASE THE DISTRICT COURT ERRED IN RELIEVING THE SHIPOWNER OF LIABILITY WHERE IT HAD ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF THE DANGER AND FAILED TO WARN THE DECEDENT OF OR CORRECT THE HAZARD POSTED BY THE DEFECTIVE SCAFFOLD ABOARD SHIP. THE DISTRICT COURT ONLY FOUND THAT THE DECEDENT'S EMPLOYER HAD KNOW-

LEDGE OF THE DANGER; THE COURT DID NOT FIND ACTUAL KNOWLEDGE ON BEHALF OF THE DECEDENT AND THUS COULD ONLY HAVE BARRED PLAINTIFF'S ACTION BY IMPUTING THE NEGLIGENCE OF DECEDENT'S EMPLOYER TO THE DECEDENT IN ORDER TO ESTABLISH ASSUMPTION OF RISK. SUCH AN APPLICATION OF THE FIFTH CIRCUIT NEGLIGENCE STANDARD IS INCONSISTENT WITH THE VIEW OF 33 U.S.C. § 905(b) EXPRESSED BY THIS COURT IN *EDMONDS V. COMPAGNIE GENERALE TRANSATLANTIQUE.*

In its orally-assigned reasons for judgment, the District Court stated that the Lykes Brothers' crew ". . . did know of the danger, but failed to warn the deceased" (Record on Appeal, Vol. II at 3). Thus, the District Court agreed with plaintiff that parts "a) and c)" of Restatement § 343 fit the facts so as to indicate liability on the part of the defendant shipowner. The Court then answered the remainder of the analysis, found in § 343(b) and 343 (A) (1) (the assumption of risk portion) by stating that ". . . it appears to be uncontested then that *Dixie* was aware of the absence of handrails or scaffolding." (Record on Appeal, Vol. II at 5, emphasis supplied).

At no point did the Court determine or was there a showing that the decedent himself ever realized or was aware of the danger. The Court only found that the danger posed by the lack of guardrails was "known or obvious" to Dixie Machine, the de-

cedent's employer and then concluded that ". . .in the instant case. . . the lack of handrails 'was not the type of danger that must be faced notwithstanding knowledge." (Record on Appeal, Vol. II at 5).

It is apparent then that the District Court imputed Dixie Machine's awareness of the danger to the decedent. It is submitted that such a misapplication of the Restatement standard is inconsistent with this Court's view of 33 U.S.C. § 905(b) as expressed in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753 (1979). *In Griffith v. Wheeling-Pittsburgh Steel Corporation, supra,* the Third Circuit rejected a negligence standard which would have imputed an employer's negligence to an injured longshoreman stating:

> "Under American's first proposed standard of care the vessel would be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor failed to perform his tasks in an 'expert and experienced' fashion. This would occur whether or not the individual longshoreman was personally at fault. *The proposed rule thus imputes to the non-negligent longshoreman the negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in Edmonds v. Compagnie Generale Transatlantique, supra. It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to reduce his recovery against a negligent shipowner, would approve a rule barring all recovery against a*

> *negligent shipowner on the basis of imputed employer negligence.*" (Emphasis supplied) 610 F. 2d at 124-125.

Thus, the Court in *Griffith* concluded that the decision of this Honorable Court in *Edmonds* by reasonable logical extension stands for the proposition that if the negligence of a stevedore cannot be imputed to the longshoreman for the purpose of *reducing* recovery against a shipowner, such stevedore negligence can certainly not be imputed to the longshoreman so as to bar all recovery. Yet the District Court imputed the negligence of the decedent's employer to him so as to bar all recovery by his surviving wife and the Fifth Circuit Court of Appeals affirmed, apparently ignoring this Honorable Court's statement in *Edmonds,supra,* that ". . .the ship will be liable for all of the damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury." (Emphasis supplied) 443 U.S. at 269.

Accordingly, it is urged that, even if Restatement §§ 342, 343, and 343(A) state the proper § 905(b) negligence standard (which would be strictly contrary to the intent of Congress and the jurisprudence of this Honorable Court), the standard was misapplied in the instant case so as to impute the negligence of the decedent's employer to him so as to bar all recovery. Therefore, plaintiff respectfully submits that her "Petition for Writ of Certiorari" should be granted so that this Honorable Court may answer the novel questions presented above. Moreover, petitions for writs of certiorari have been filed and are pending in the following cases which present is-

sues similar to those presented here: *Santos v. Scindia Steam Navigation Company,* No. 79-512, filed September 26,1979 seeking cert. to Ninth Circuit; *Griffith v. Wheeling-Pittsburgh Steel Corporation,* No. 79-813, filed November 23, 1979 seeking cert. to Third Circuit; *Johnson v. A/S Ivarans Rederi,* No. 79-1587, filed April 10, 1980 seeking cert. to First Circuit; *Ernst Russ Steamship Co. v. Matthews,* No. 79-624, filed October 15, 1979 seeking cert to Seventh Circuit; *McCulley v. Mitsui O.S.K. Lines, Ltd.,* No. 79-706, filed November 1, 1979 seeking cert. to Seventh Circuit; *Stockstill v. Gypsum Transportation,* No. 79-1240, filed February 8, 1980 seeking cert. to the Fifth Circuit. It is submitted that, in view of the irreconcilable split that has arisen among the Circuits, this petition should be granted.

RESPECTFULLY SUBMITTED:

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APPENDIX

I. *REASONS FOR JUDGMENT ORALLY ASSIGNED BY THE DISTRICT COURT AT HEARING ON MOTION FOR SUMMARY JUDGMENT OF DISMISSAL, SEPTEMBER 12, 1979* (EXCERPTED FROM RECORD ON APPEAL, VOL. II AT PAGES 3-7)

"A three part analysis is necessary to determine the ship owner's liability.

First, did the crew know of the hazard, and, if so, did the crew warn the invitees? That's point Number 1.

Statements made by the crew members in their depositions (Powell on page 11; Ratley on page 2) indicate that the crew did know of the danger, but failed to warn the deceased.

Second, according to *Brown*, even if the crew was aware of the danger, it could be relieved of its duty to warn if the deceased knew or should have known of the danger.

Now, you argue that this is a contested issue that there's no evidence indicating that Dixie knew that it was violating a federal safety regulation and thereby creating an unsafe working condition. That's your contention.

But Oscar Crespo, a foreman of Dixie Machine, who was in charge of the work that was being performed by the deceased, made the following statements in his deposition:

Q. Who built the platform?

A. Dixie Machine built the platform.

Q. And when did they build it?

A. Usually the day - more likely the day before they went to work. Might have been there a day and a half, I don't know, but we built the platform. It

was a very stable platform, but handrails weren't put up yet.

Q. And when did you check it, the platform?

A. We checked it the same day when we put up the boards.

Q. Why didn't you see that handrails were put around it?

A. We didn't get to it, to tell you the truth. We didn't get to it. We were in the process of putting handrails up on the other side and they were working on this side.

Q. In other words, you anticipated getting to it at a later time?

A. Right, that day.

So it appears to be uncontested then that Dixie was aware of the absence of handrails or scaffolding.

The third part of the analysis laid out in Brown requires an answer to the following question:

Even though the Plaintiff was aware of the hazard, should the Defendant have anticipated that the deceased, not withstanding his knowledge of the danger, would continue to expose himself to the hazard?

If the answer is yes, the ship owner would still have a duty to correct the hazard.

If the answer is no, the ship owner would be relieved of this duty, even though the crew knew of the danger.

The *Brown* case suggests that in the instant case that the lack of handrails "was not the type of danger that must be faced notwithstanding knowledge". Look at page 334 of 550 Fed. Second.

Judge Wisdom made three important observations in

the *Brown* case.

(1) The Plaintiff was aware of the danger;

(2) The hazard was solely created by the Plaintiff's employer;

(3) The Plaintiff was in a better position to correct the hazard, even though the ship's crew also knew of the hazard.

I believe that the instant case is analogous to the *Brown* case.

(1) Dixie was aware of the hazard, for the point.

(2) Dixie was in the better position to create the hazard. Indeed, they planned to do so later in the day on the day of the accident.

Now, the *Brown* case drew its support from the earlier Fifth Circuit decision from *Gay versus Ocean Transportation & Trading, Inc.*, 546 Fed. Second, 1233; that's a 1977 case.

In the *Gay* case a stevedore was injured while unloading a ship.

The *Gay* Court ——

Let me withdraw that. The Court in the *Gay* case observed that (1) the Plaintiff knew of the hazard; (2) the hazard was solely created by the Plaintff, and; (3) the Plaintiff was in the best position to correct the hazard, and the Court in the *Gay* case concluded:

"It is clear that the vessel had no liability under Section 905(b) since the sole cause of the injury was the negligence of the Plaintiff." Look at page 1240 of 546 Fed.

Second.

I'm going to take one more shot at summary judgments, and I hope, Mr. Wright, you can uphold me.

I'm going to grant your motion for summary judgment."

II. FACSIMILE OF JUDGMENT OF DISMISSAL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MRS. MARIA TOTH FUTO	*	CIVIL ACTION
VERSUS	*	NO. 77-3237
LYKES BROS. STEAMSHIP CO., INC.	*	SECTION "F"

* * * * * * * * * * * * * * * * *

JUDGMENT

THIS ACTION came on for hearing before the Court September 12, 1979, Honorable Lansing L. Mitchell, District Judge, presiding, on defendant's motion for summary judgment, and the motion having been duly considered, and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that plaintiff, Mrs. Maria Toth Futo, individually and in her capacity as the personal representative and administratrix of the Estate of John Futo, take nothing, that the action be dismissed on the merits, and that the defendant, Lykes Bros. Steamship Co., Inc., recover costs of the action.

DATED at New Orleans, Louisiana, this 18th day of September, 1979.

/S/ LANSING L. MITCHELL

CLERK OF COURT

DATE OF ENTRY Sept. 28, 1979

III. FACSIMILE OF JUDGMENT OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT OF THE DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3359
Summary Calendar*

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

Plaintiff-Appellant,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Intervenor-Appellant,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

(May 27, 1980)

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1/

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*Fed. R. App. P. 34(a); 5th Cir. R.18.

1/ See *NLRB v. Amalgamted Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970.)

IV. FACSIMILE OF ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3359

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

Plaintiff-Appellant,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Intervenor-Appellant,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(June 23, 1980)

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the

same is hereby denied.

ENTERED FOR THE COURT:

/S/ Albert J. Henderson

UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, Alonzo T. Stanga, III, a member of the Bar of the United States Supreme Court, do certify that service of three (3) copies of this petition for writ of certiorari was made by mail on Lykes Brothers Steamship Company, Inc. through its counsel of record, William E. Wright, at the offices of Terriberry, Carroll, Yancey and Farrell, 2100 International Trade Mart, New Orleans,Louisiana, and upon the Insurance Company of The State of Pennsylvania through its counsel of record, Peter L. Hilbert, Jr., at the offices of McGlinchey, Stafford and Mintz, Camp and Capdeville Streets, P.O. Box 2000, New Orleans,Louisiana, all in accordance with Rule 28, paragraph 3 and Rule 19, paragraph 3 of the Rules of the Supreme Court of the United States, this 19th day of September, 1980.

ALONZO T. STANGA, III
Attorney for Plaintiff

80-455

NO.

Supreme Court, U.S.
FILED
OCT 22 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Intervenor

VERSUS

LYKES BROTHERS STEAMSHIP COMPANY, INC.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a shipowner entitled to dismissal of an action brought pursuant to 33 U.S.C. §905(b) where the facts fail to support a finding of any negligence on the part of the shipowner?

TABLE OF CONTENTS

Page

Jurisdiction 1

Question Presented i

Statement of the Case 1

Argument 4

Conclusion 8

AUTHORITIES CITED

CASES:

Brown v. Mitsubishi Shintaku Ginko,
550 F.2d 331 (5th Cir. 1977). 5

Johnson v. A/S Ivarans Rederi,
613 F.2d 334 (1st Cir. 1980) 5,6

Stockstill v. Gypsum Transportation,
607 F.2d 1112 (5th Cir. 1979). 6,7

Fitzgerald v. Corparia Naviera La Molina,
394 F.Supp. 413 (E.D.La. 1975) 6

STATUTES:

33 U.S.C. §901, *et seq.* 5

MISCELLANEOUS:

Restatement (Second) Torts (1965)

Section 343 6

Section 343A 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Intervenor

VERSUS

LYKES BROTHERS STEAMSHIP COMPANY, INC.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

The following facts are supported by the record and are undisputed:

On October 7, 1977 plaintiff was employed by Dixie Machine Welding & Metal Works, Inc., an independent contractor which was performing repairs on defendant's vessel the SS SHIRLEY LYKES. The vessel was moored at Dixie's facilities at the Andry Street Wharf in the Port of New Orleans. (Record, Vol. I, pp. 206, 222, 231, 273.)

Dixie had contracted with defendant Lykes to provide repair services as described in various clauses and specifications set forth in the contract, and agreed to do so in such a way as to meet the requirements of the applicable Classification Society and the United States Coast Guard. (Record Vol. I, pp. 32 *et seq.*, 222, 231, 273). Dixie further agreed to complete the work to the satisfaction to the owner's representative and to furnish all employees, materials, equipment, supervision and direction. Dixie also agreed fully to protect the ship and Lykes Bros. as owner against any and all claims for disability, injuries or death of Dixie's employees who would be engaged by Dixie to carry out the work "... on or pertaining to the vessel or vessels, and ... deliver... and keep in force a certificate indicating that [Dixie] ... complied with the provisions of the Longshoremen's and Har-

bor Worker's Compensation Act... securing of the payment of compensation under said Act." (Record, Vol. I, pp. 32 *et seq.*, 222, 231, 273.)

At the time of decedent's accident and at all times during the entire work process contemplated by the parties to the contract, the SS SHIRLEY LYKES was completely shut down. The vessel was without power or electricity except as furnished from ashore by Dixie. (Record, Vol. I, p. 200). The vessel remained afloat at the Dixie Wharf, but was neither moved nor was capable of movement under her own power. The SS SHIRLEY LYKES was therefore a dead ship undergoing extensive repairs and all work on the vessel was completely and solely under the control, direction and supervision of Dixie and Dixie's employees. (Record, Vol. I. p. 206.)

Representatives of Lykes Bros. boarded the vessel on occasion to see that the work product ultimately conformed to the plans and specifications of the contract. (Record, Vol. I, pp. 200, 222, 272.) Three Lykes Bros. employees were also assigned to the vessel for the limited purposes of vessel security and assuring that the vessel had a safe berth. (Record, Vol. I, p. 206).

The decedent's accident occurred while the decedent and fellow employees of Dixie were attempting to remove a boom step on the vessel as required by Item No. 44 of the job specifications. That item, among other tasks, called for Dixie to "erect the necessary scaffolding and remove on completion." (Record, Vol. I, p. 45 and deposition of Oscar Crespo, p. 3.)

Employees of Dixie constructed the scaffolding without assistance, direction or supervision on the part of the Lykes employees aboard the vessel. (Deposition of Crespo, p. 10) No Lykes employee was in the area at the time of the accident and no Lykes employee was aware that decedent was working on the scaffolding. (Record, Vol. I, pp. 199, 202, 203, 204, 246, 250, 255 and 279.) Decedent fell from the scaffolding platform when he attempted to work before the platform was complete. (Deposition of Crespo, p. 22.)

There is no suggestion in the record or depositions that Lykes or Lykes' employees knew or should have known that Dixie employees were performing or intended to perform work on the boom before they completed the platform. There is also no evidence in the record to establish or suggest that Lykes or anyone employed by Lykes was at or near the scene of the accident or exercised any control, direction or supervision of the work at the time of decedent's accident, prior to that time, or at any time thereafter. Furthermore, there is nothing to establigh or suggest that Lykes had any obligation directly, indirectly or otherwise to safeguard or supervise decedent's work or to oversee the construction of the scaffolding from which decedent fell. (Record, Vol. I, pp. 167, *et seq.*)

ARGUMENT

The arguments presented in support of plaintiff's petition for writ of certiorari are patently insufficient to uphold a grant of certiorari herein.

First, the split of authority among the circuits over the

appropriate Section 905(b) standard has absolutely no bearing on the outcome of this action. Defendant undeniably exercised no control, direction or supervision of the work and had no obligation directly, indirectly or otherwise to direct the day to day progress of the work. The scaffolding was neither supplied by nor erected by defendant and defendant owed no duty to dececent to inspect the work of the independent contractor. The Lykes Bros. employees on the vessel were not present at the scene of decedent's accident nor were they aware at that time or prior thereto that the Dixie employees had failed to complete the scaffolding and that decedent was attempting to work on the boom before the scaffolding was complete.

Assuming for argument that the firmly established standard expressed in *Brown v. Mitsubishi Shintaku Ginko,* 550 F.2d 331 (5th Cir., 1977) and embraced by the Second, Fourth, Fifth and Seventh Circuits is wrongly applied to actions arising out of Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, and that the proper standard is the "reasonable care" standard expressed in *Johnson v. A/S Ivarans Rederi,* 613 F.2d 334 (1st Cir. 1980), all of which is denied, the facts still present no basis for finding negligence on the part of defendant Lykes Bros. Neither the vessel nor its interests owed any duty to the Dixie employees to inspect and safeguard the work product of those employees on the vessel. Further, the condition which caused decedent's death was not within the control of defendant and neither the vessel nor its interests knew or should have been aware of the

condition or that the condition could pose any risk of harm to Dixie's employees. Defendant accordingly owed no duty to protect plaintiff's decedent from the danger encountered and did not fail to exercise reasonable care under the circumstances. The "reasonable care" standard of *Johnson, supra*, would therefore compel the same result as the "open and obvious" standard of *Brown, supra*, given these undisputed facts.

Additional support for this position is found in *Stockstill v. Gypsum Transportation*, 607 F.2d 1112 (5th Cir. 1979), *reh.* and *reh. en banc den.*, where the court upheld a directed verdict on facts very similar to those here. Albeit application of the "open and obvious" test was affirmed, the court stated that the shipowner had absolutely no duty "to assume 'a vigilant concern for the well being of the contractor's employees,' particularly where they have failed to exercise due care in the course of their work." 607 F.2d at 1117, citing *Fitzgerald v. Compania Naviera La Molinera*, 394 F.Supp. 413 (E.D. La., 1975).

Petitioner's second argument similarly fails to disclose any reason for overturning the decisions of the district court and the Court of Appeals. Section 343 of the Restatement (Second) of Torts (1965) requires proof that the possessor of the property:

1) knew or should have known of the condition, *and*
2) should have expected that the invitees would not realize the danger *and*
3) failed to take reasonable precautions to protect them against the danger.

There is nothing in the record to suggest that defendant's employees knew or should have known of the condition of the scaffold. Clearly, mere presence of the employees aboard the ship is not enough. *Stockstill v. Gypsum Transportation, supra,* at 1117. There is also nothing to indicate that defendant or its employees knew that decedent or other Dixie employees were working on the scaffolding before it was complete or that defendant should have realized that decedent would fail to protect himself. Accordingly, defendant could not have failed to exercise reasonable care to protect decedent.Accordingly, there can be no question but that defendant has no liability as determined by application of the cumulative requirements of Section 343.

Similarly, if Section 343 (A) of the Restatement is invoked, defendant cannot be found liable under these facts. Defendant's employees may have realized the danger after the fact, but could not have anticipated the accident where 1) they were not aware of the condition; 2) they were not aware that decedent or other Dixie employees were working on the scaffolding; and 3) they could not have known that decedent would attempt to work on the scaffolding before it was complete.

It is respectfully submitted that the facts established in the record leave no basis for inferring any possible negligence on the part of defendant Lykes Bros. Steamship Company, no matter which of the standards is applied, It is further submitted that the District Judge properly considered the available evidence in the light most favorable to plaintiff and determined that there was no issue of material fact as to the question of de-

fendant's negligence. Accordingly, defendant requests that this Honorable Court deny plaintiff's petition.

CONCLUSION

For the reasons set forth above, the petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

TERRIBERRY, CARROLL, YANCEY & FARRELL

William E. Wright
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Telephone: 504-523-6451

CERTIFICATE OF SERVICE

I, William E. Wright, attorney for respondent Lykes Bros. Steamship Company, Inc. and a member of the Bar of the Supreme Court of the United States, hereby certify that service of three copies of the foregoing Brief in Opposition has been made on Alonzo T. Stanga, III, attorney for petitioner, and Peter L. Hilbert, Jr., attorney for petitioner-intervenor, by depositing same in the United States mails, postage prepaid and properly addressed, this day of October, 1980.

WILLIAM E. WRIGHT
Attorney for Respondent